

**Benjamin v Madison Med. Bldg. Condominium Bd.
of Mgrs.**

2011 NY Slip Op 30239(U)

February 2, 2011

Sup Ct, NY County

Docket Number: 602220/06

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUDITH J. GISCHE

PART 10

Justice

Benjamin W

INDEX NO.

602230/06

MOTION DATE

- v -

MOTION SEQ. NO.

004

MOTION CAL. NO.

Madison Medical Building

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

FILED

FEB 03 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/2/11

HON. JUDITH J. GISCHE

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 10

-----X
MAURICE J. BENJAMIN,

Plaintiff,

- against -

MADISON MEDICAL BUILDING
CONDOMINIUM BOARD OF
MANAGERS and MITCHELL ESSIG,

Defendants.
-----X

DECISION/ORDER
Index No. 602220/06
Seq No.: 004

Present:
Hon. Judith J. Gische
J.S.C.

FILED

FEB 03 2011

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this
(these) motion(s):

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Papers	Numbered
Essig n/m (3212) w/MAL affirm, ME affid, exhs	1
Board opp w/ISK affirm	2
Essig reply w/MAI affirm, ME affid	3
Board supp opp w/RSG affirm, exh	4
Essig supp reply w/MAL affirm, ME affid, exhs	5

Upon the foregoing papers, the court's decision and order is as follows:

GISCHE, J.:

This is an action by plaintiff Maurice J. Benjamin ("plaintiff" or "Benjamin") for specific performance of the right of first refusal ("ROFR") provisions set forth in the By-Laws of the Madison Medical Building Condominium ("by-laws"). The ROFR pertain to basement space which is beneath his professional office space. Defendant Mitchell Essig Essig is the sole shareholder of Essig Properties, Inc., the owner of unit 4SW which is also located directly above the basement space. Defendants Madison Medical

Building Condominium Board of Managers (“the Board”) and Essig Properties, Inc. (“EPI”) entered into a contract for the purchase of the basement space.

Plaintiff previously moved for summary judgment against defendant Madison Medical Building Condominium Board of Managers (“the Board”) and Essig: (i) declaring the sale of the basement space to Essig was in violation of plaintiff’s rights under the by-laws; (ii) directing the board to offer plaintiff the right of first refusal to purchase the basement space; and (iii) summary judgment dismissing the counterclaim asserted against him by Essig for tortious interference with contract. Essig and the Board separately cross moved for summary judgment dismissing the complaint and the cross claims asserted against them.

The court, among other things, granted plaintiff’s motion as to his specific performance and breach of contract claims against the board for its failure to comply with the by-laws (Order, Gische J., 12/24/10). Benjamin’s motion for summary judgment on his 6th cause of action (voiding Essig’s contract) was denied, however, because whether Essig’s contract was void/voidable could not be decided by the court at that time.

The Board appealed the court’s prior order and obtained a stay (Order, Appellate Division, First Department, 2/17/09) (“stay”) which remained in effect pending the court’s decision on the appeal. This court’s prior order was affirmed (Benjamin v. Madison Medical Bldg Condo Bd of Managers, 66 AD3d 510 [1st Dept 2010]).

Essig has now moved for summary judgment on his cross claims against the Board and the Board’s cross claims against him. He also seeks an order vacating the stay imposed by the Appellate Division on February 17, 2009 and amending the

caption.

The note of issue was filed by plaintiff on April 3, 2008 , the Appellate Division's decision affirming this court's prior ordered was entered on October 15, 2009. This motion was not made until April 13, 2010 when it was served. Essig acknowledges that this motion is not timely (CPLR § 3212; Brill v. City of New York, 2 NY3d 648 [2004]). He argues, however, that he has "good cause" for why he did not bring this motion sooner or seek this relief in 2008 when he cross moved in response to Benjamin's motion. He contends that because this case was stayed pending the decision on appeal, he could not move until it was lifted. Thus, he asks the court to lift the stay now. Essig also claims that until the Appellate Division decided the appeal on this court's decision ordering the ROFR to be offered to all similarly situated unit owners in the building, he could not moved on his cross claims.

The Board urges the court to deny all branches of Essig's motion because the contract to purchase the basement was between the Board and EPI – not Essig individually– therefore, Essig has no standing to commence seek damages for a contract he is not a party to. The Board argues that Essig has not, and cannot, prove he sustained monetary damages when another doctor who offered to buy into his medical practice changed his mind.

Before the court can consider the merits, the court must resolved the issue of whether Essig's motion for summary judgment is timely.

CPLR 3212 requires that a motion for summary judgment "*shall* be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown . . ." (emphasis added). Good cause requires a

“satisfactory explanation for untimeliness ...” (Brill v. City of New York, 2 NY3d 648, 648 [2004]; Miceli v. State Farm Mut. Auto. Ins. Co., 3 NY3d 725 (2004); Perini v. City of New York, 16 AD3d 37 (1st Dept 2005); Brown v. City of New York, 6 Misc3d 1017(a) [Sup Ct 2005]).

The stay was issued “pending hearing and determination of the ...” appeal of this court’s prior order. Once the appeal was decided, Essig could have brought this motion. Instead, he waited until April 2010 – almost eight (8) months later – to do so. There is no excuse for the delay. Thus, while he may have a satisfactory explanation for why he could not move until he knew the decision on appeal, Essig’s delay in then promptly moving cannot be overlooked. Therefore, this motion is untimely.

Other branches of Essig’s motion are not for summary judgment and can be addressed on the merits because the time limitations of CPLR 3212 do not apply.

The motion for a lifting of the stay in this case is granted only to the extent that this case is now ready for trial and it is referred to the Trial Support Office for scheduling. There was never any stay imposed by the court. The only stay was the appellate stay which ended when it decided the appeal. In fact this case appeared numerous times on the mediation calendar which each appearance being adjourned.

Essig seeks permission to amend the “caption of this case” to more properly reflect the name of defendant Board by adding “Madison Medical Building Condominium a/k/a Madison Medical Building.” According to Essig, there is no prejudice because the condo and the Board are one and the same. The Board opposes the motion, arguing that Essig is trying to add the condo as a third party and he had plenty of time to commence that action. Furthermore, according to the Board, it

is Benjamin's responsibility to amend the caption/complaint, and Essig has no right to seek an amendment thereto.

Essig's motion is not to add new parties or amend the claims. Although the condominium is a separate entity, all it does is own the property. The Board is the governing body of the condominium and therefore, its "brain" (Condo By-Laws, Article III, section 5) empowered to take action on behalf of the condominium. Without the Board, the condominium could not implement rules or sign contracts. Thus, as Essig correctly argues (at least for purposes of this action), the Board and the condominium are one and the same and amending the caption to add the condominium is justified. Examining the contract with the condominium to buy the basement space, it shows that the seller is "Madison Medical Building." Therefore, the motion to amend is granted.

The court has considered arguments as to why Essig has no standing to seek summary judgment, even if the motion had been timely. The court disagrees. A prior stipulation among the parties dated April 14, 2008 appears to take care of all the issues raised by the Board. In relevant part the stipulation provides that:

7. All causes of action or defenses by or against the defendant Essig....that are based upon standing of his corporation Essig Properties, Inc. [EPI] shall be deemed rightfully assigned to him.

8. Essig further warrants and represents that Essig Properties is an active New York Corporation in good standing, that the owners of Essig Properties have unanimously approved the above assignment.

9. Benjamin and Madison Medical recognize the right of Essig to defend and prosecute this action per assignment from Essig Properties.

10. [***]


ORDERED that Essig's motion for the stay in this action to be vacated is granted only to the extent that this case is ready to be tried; plaintiff shall serve a copy of this decision and order upon the Clerk in the Office of Trial Support so this case can be scheduled for trial; and it is further

ORDERED that any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
February 2, 2011

So Ordered:



Hon. Judith J. Gische, J.S.C.

FILED

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